UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	*	
	*	
v.	*	
	*	Criminal Action No. 14-30044-MGM
SYED BOKHARI,	*	
	*	
Defendant.	*	

MEMORANDUM AND ORDER REGARDING
MOTION TO DISMISS AND MOTIONS TO SUPPRESS
(Dkt. Nos. 242, 243, and 245)

March 25, 2019

MASTROIANNI, U.S.D.J.

I. INTRODUCTION

Presently before the court are a motion to dismiss the superseding indictment (Dkt. No. 243) and two motions to suppress—one directed at warrants issued to search two email addresses (Dkt. No. 242) and one directed at warrants issued to search a residence and two businesses (Dkt. No. 245)—filed by Syed Bokhari ("Defendant"). In his motion to dismiss, Defendant argues the court should dismiss the superseding indictment because of the appearance of a vindictive prosecution in violation of his due process rights. (Dkt. No. 243.) In his motions to suppress, Defendant contends the affidavits in support of the various warrants failed to establish probable cause, and contain false and/or misleading assertions and omissions of material fact warranting a hearing under *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). He also asserts, in connection with the motions to suppress, that the warrants are overbroad and fail to particularize the objects to be seized. For the following reasons, the court will deny Defendant's motions.

II. BACKGROUND

On December 3, 2015, Defendant was charged in a superseding indictment with racketeering conspiracy, wire fraud, contraband smokeless tobacco trafficking, conspiracy to commit money laundering, money laundering, and violations of the Prevent All Cigarette Trafficking ("PACT") Act. (Dkt. No. 137.) Defendant's charges arise out of an investigation which resulted in the execution of a number of search warrants, approved by magistrate judges in Pennsylvania, Connecticut, and Massachusetts. Specifically, the government sought and obtained warrants to search: Cigar & Supplies, Inc., a tobacco warehouse in Scranton, Pennsylvania ("Scranton Warehouse"); Defendant's residence in Middletown, Connecticut; a restaurant and banquet facility in Berlin, Connecticut ("Hawthorne Inn"); two Earthlink email accounts; and three Hotmail email accounts. (Dkt. Nos. 242-1, 242-2, 245-3, 245-4, 245-5.) As the parties acknowledge, the affidavits submitted in support of the five warrants are very similar, containing essentially the same general allegations.[1] The affidavits set forth details regarding a scheme to avoid the payment of state tobacco taxes and otherwise violate state and federal tobacco laws, alleging as follows.

A. History of the Scheme as Alleged in Affidavits

By at least 2002, Defendant operated a warehouse in Springfield, Massachusetts ("Springfield Warehouse"), which sold smokeless tobacco (also known as chewing tobacco) and cigars, among other items. (Dkt. No. 248 ¶¶ 5, 53.) While Defendant operated the Springfield Warehouse, it used the names "SMB, Inc." and "U-Gain." (*Id.*) As discussed below, formal ownership of the Springfield Warehouse and its business names changed a number of times over the coming years. At all times, however, businesses operating out of the Springfield Warehouse failed to pay the required Massachusetts smokeless tobacco tax and underpaid the required Massachusetts cigar tax. (*Id.* ¶ 5.)

[1] Accordingly, the court will cite the affidavit submitted in support of the two Connecticut warrants when recounting common allegations across the various affidavits.

Moreover, by at least 2003, Defendant operated a warehouse in Berlin, Connecticut ("Berlin Warehouse"). Similar to the Springfield Warehouse, formal ownership of the Berlin Warehouse and its business names changed a number of times, but at all times these businesses vastly underpaid the required Connecticut tobacco taxes. (*Id.* ¶¶ 8, 157-163.)

In November of 2002, Tom Nowicki, a Massachusetts Department of Revenue Investigator, became involved in an investigation of Defendant's business at the Springfield Warehouse, having received information from a distributor of convenience store products that a business named U-Gain was selling untaxed smokeless tobacco. (*Id.* ¶ 54.) That same month, as Nowicki was researching the Springfield Warehouse, Defendant was arrested and charged in Connecticut state court for selling untaxed "little cigars" through SMB, Inc. in Berlin, Connecticut, at a location near the Berlin Warehouse, although the charges were later dismissed. (*Id.* ¶ 56.)

In January of 2005, Nowicki served a summons on SMB, Inc, in order to obtain financial and business records, including smokeless tobacco sales. (*Id.* ¶ 58.) Shortly thereafter, Nowicki was advised that an attorney would be representing Defendant, SMB, Inc., and U-Gain. (*Id.* ¶ 59.) On February 2, 2005, Nowicki met with this attorney and "provided her with information relevant to tobacco tax and sales tax laws and regulations." (*Id.*) That same month, an individual made a complaint about Defendant to the Massachusetts Department of Revenue, alleging that large amounts of chewing tobacco were being warehoused by SMB, Inc. at the Springfield Warehouse and identifying Defendant as the President of the company. (*Id.* ¶ 61.)

Nowicki advised the affiant "that per his checks within the Massachusetts Department of Revenue, neither [Defendant], 'U-Gain,' nor 'SMB, Inc.' were ever licensed to wholesale tobacco in the state of [Massachusetts], nor did any of those named entities ever remit excise tax on smokeless tobacco." (*Id.* ¶ 65.) Nowicki further advised the affiant "that it was his determination, and the determination of the Audit Division of the DOR, that [Defendant] had been engaged in the sale of

smokeless tobacco during 2001 to 2005 without the appropriate payment of excise tax to the state Department of Revenue." (*Id.* ¶ 65.) In addition, according to Nowicki and copies of documents provided to the affiant, Defendant and SMB, Inc. were served multiple "Notices of Failure to File Smokeless Tobacco Excise, as well as follow-up letters regarding those failures." (*Id.*)

In April of 2005, about two months after Nowicki met with Defendant's attorney, Defendant incorporated a new business, "Cigar and Supplies, Inc.," in Scranton, Pennsylvania, as a business which sells smokeless tobacco and cigars ("Scranton Warehouse"). (*Id.* ¶ 74.) Pennsylvania, it should be noted, is the only state with no excise tax on smokeless tobacco, although it does tax "little cigars." (*Id.* ¶¶ 74, 93.) The Scranton Warehouse was owned, operated, and controlled by Defendant. (*Id.* ¶ 265.)

On March 29, 2006, a Massachusetts Department of Revenue compliance officer "called the Scranton Warehouse and inquired about buying items from them, advising that he was a small store owner located in Massachusetts." (*Id.* ¶ 77.) The compliance officer "was told that Cigar & Supplies would sell to him and ship any items to him via UPS." (*Id.*) After the compliance officer stated that he was calling from Worcester, Massachusetts, "[h]e was told that if he was in Springfield he could pick up his order at the Springfield Warehouse and was given the telephone number for the Springfield Warehouse." (*Id.*)

Around the same time period, the Connecticut Department of Revenue Services also was investigating whether Defendant was avoiding Connecticut tobacco taxes in connection with the Berlin Warehouse. (*Id.* ¶ 70.) In January of 2006, Defendant was "arrested pursuant to a Connecticut state court arrest warrant charging him with 32 counts of Failure to File a Tobacco Products Return," but "[i]n July of 2006, the case was nolle'd after some payment was made by [Defendant]." (*Id.*) Later that year, the Connecticut Department of Revenue Services began an audit of Defendant's business at the Berlin Warehouse. After nearly two years, this audit found that the Berlin Warehouse

had evaded $1,306,947.56 in excise taxes, assessing SMB, Inc. a total of $2,286,375.62 (including interest and penalties) for the period of April of 2003 to September of 2006. (*Id.* ¶¶ 71, 73.)

On May 17, 2007, Defendant filed an Immigration Petition for Alien Worker for Irfan Sami. (*Id.* ¶ 78.) The petition "sought to permit Sami, a Pakistani, to work at the Springfield Warehouse to 'manage sales activity.'" (*Id.*) Defendant signed the petition as "President of SMB, Inc., d/b/a U-Gain," and "[t]he SMB, Inc. letterhead for one of the documents submitted as part of this petition showed the addresses for both the Springfield Warehouse and the Berlin Warehouse." (*Id.*) The affiant discovered, after beginning his investigation in 2009, that Sami was working as a manager at the Scranton Warehouse. (*Id.*)

On June 18, 2008, a new Massachusetts business, "King Cash and Carry, Inc.," was established at the address of the Springfield Warehouse, with Jaspal Singh listed as the President in the corporate filing. (*Id.* ¶ 79.) On September 4, 2008 and September 25, 2008, Defendant wrote two checks from the Cigar & Supplies, Inc. bank account to King Cash and Carry, Inc., one for $40,000 and one for $50,000. (*Id.* ¶ 80.) The memo line ("For") on the second check contains a handwritten notation stating "50%." (*Id.*)

On September 29, 2008, Singh emailed Defendant information about the incorporation process for a new business, "Discount Novelties and Merchandise" (*Id.* ¶ 81.) On September 30, 2008, Discount Novelties and Merchandise was incorporated, listing Singh as the President and a Director and listing the address of the Springfield Warehouse. (*Id.* ¶ 82.) In addition, the corporate filing listed Tehmina Imran, Defendant's wife, as the Secretary and a Director. (*Id.*)

On May 13, 2009, the Massachusetts Department of Revenue submitted a "Request for Information" form to the U.S. Postal Service requesting help in determining whether SMB, Inc. was using the address of the Springfield Warehouse. (*Id.* ¶ 83.) The U.S. Postal Service responded that this address for SMB, Inc. "was checked as 'Good as addressed.'" (*Id.*) In addition, the post office

explained in a handwritten note: "1-3-08 USPS was informed that SMB moved and left no forwarding address. Recently the owners told me they now want all mail for SMB Corp. because 'we're all family.' K. A. 5/16/09." (*Id.*) According to the affiant, "[t]his indicates that new corporate entity at the Springfield Warehouse was accepting mail for the old corporate entity." (*Id.*)

On July 2, 2009, following repeated notices, the Massachusetts Department of Revenue's Bureau of Filing Enforcement issued a "Notice of Assessment" against "SMB, Inc. c/o [Defendant]" covering the years 2001 to 2008 for failure to pay Massachusetts excise tax on smokeless tobacco. (*Id.* ¶ 67.) The total assessment amounted to $40,636,273.80, including interest and penalties. (*Id.*) According to Nowicki, "neither SMB, Inc. nor [Defendant] have paid any of the monies due to the state of Massachusetts, and, as far as Inv. Nowicki knows, neither is engaged in any current legal or financial discussions with the state to pay any owed excise taxes in whole or in part." (*Id.* ¶ 68.) Nowicki also advised the affiant "that due to laws and regulations concerning businesses and taxes, he believes that the Commonwealth of Massachusetts does not have the legal ability to pursue any collection efforts against [Defendant] himself, as the entity charged was actually 'SMB, Inc.,'" which was not "a legal corporation in the state of Massachusetts." (*Id.*) Moreover, although the Massachusetts Department of Revenue was "attempting to collect taxes owed from SMB, Inc.," the affiant had not "observed or discovered any assets currently controlled or belonging to SMB, Inc." after analyzing "dozens of bank accounts and business records relevant to [Defendant]." (*Id.*)

B. Distribution from the Scranton Warehouse

In 2009, when the affiant began his investigation, he identified a white box truck registered to Discount Novelties and Merchandise at the address of the Springfield Warehouse. (*Id.* ¶ 84.) After extensive surveillance, the affiant "determined that this vehicle appeared to make regular runs, on Mondays and Thursdays, to Scranton, PA to obtain product from Cigar and Supplies" at the

Scranton Warehouse. (*Id.*) In 2010, a new vehicle, a white panel van, appeared at the Springfield Warehouse and followed the same pattern as the white box truck. (*Id.* ¶ 85.) This van was registered to yet another corporate entity, "A-Z Discount Merchandise," at the address of the Springfield Warehouse. (*Id.*) After the affiant and other investigators observed these vehicles at the Springfield Warehouse or Scranton Warehouse on numerous occasions, the affiant arranged for a pole camera to be installed on a utility pole adjacent to the Scranton Warehouse in February of 2011, allowing covert video and photographic surveillance. (*Id.* ¶¶ 86-87.) Between February of 2011 and January of 2012, the affiant observed, via the pole camera, the panel van being loaded with large amounts of smokeless tobacco and other products at the Scranton Warehouse on numerous occasions. (*Id.* ¶¶ 88-90.) The affiant also analyzed telephone and fax records for the Scranton Warehouse for the period of November 1, 2009 through September 30, 2010. (*Id.* ¶ 91.) These records showed a total of 195 faxes and 34 telephone calls to or from the Scranton Warehouse and the Springfield Warehouse during these eleven months, leading the affiant to believe the businesses "communicate in advance as to what product will be picked up on each occasion." (*Id.* ¶¶ 91-92.)

The affiant also witnessed similar interactions between the Scranton Warehouse and other warehouses in Connecticut and Massachusetts. Between February of 2011 and April of 2012, the affiant observed a van registered to a business at the Berlin Warehouse being loaded with large amounts of smokeless tobacco and other products at the Scranton Warehouse on numerous occasions. (*Id.* ¶¶ 164-65.) Moreover, between September of 2009 and September of 2010, telephone and fax records for the Scranton Warehouse showed a total of 294 faxes and 154 telephone calls to or from the Scranton Warehouse and the Berlin Warehouse. (*Id.* ¶¶ 167-68.) During a visit to the Berlin Warehouse on June 16, 2010, the affiant observed smokeless tobacco boxes stamped with "Cigar and Supplies, Inc. Scranton PA." (*Id.* ¶ 171.) On May 24 2011 and April 10, 2012, the affiant arranged for a confidential informant and an ATF undercover agent to purchase smokeless tobacco

at the Berlin Warehouse using audio and video recording. (*Id.* ¶¶ 173, 179.) On both occasions, the prices charged were below the "break-even" cost to the Berlin Warehouse, based on the prices the manufacturers charge wholesalers and the taxes owed to the state of Connecticut. (*Id.* ¶ 175-76, 180.) Thus, "[t]he only way the Berlin Warehouse could make money at those prices would be [to] not . . . pay the tobacco taxes." (*Id.* ¶ 177.) In addition, the receipts on both occasions "were identical in layout and format as the receipts utilized by [Defendant] at Cigar and Supplies" in Scranton, and boxes of smokeless tobacco were again observed with stamps stating "Cigar and Supplies, Inc. Scranton PA." (*Id.* ¶¶ 175, 181.) The Scranton Warehouse also provided a Pennsylvania Department of revenue investigator with a commercial shipping invoice, dated January 27, 2011, to the Berlin Warehouse. (*Id.* ¶ 169.)

Another warehouse, in Hamden, Connecticut ("Hamden Warehouse"), was "supplied with hundreds of thousands of dollars worth of tobacco by the Scranton Warehouse," but vastly underreported the quantities acquired and vastly underpaid the required excise taxes to Connecticut. (*Id.* ¶ 189.) In some of its tax filings, the Hamden Warehouse included invoices from the Scranton Warehouse indicating the product "was shipped from the Scranton Warehouse to the Hamden Warehouse 'via UPS.'" (*Id.*) Between 2009 and 2011, telephone and fax records for the Scranton Warehouse showed a total of 265 faxes and 147 telephone calls to or from the Scranton Warehouse and the Hamden Warehouse, as well as 131 telephone calls between the Scranton Warehouse and a phone number for the individual who operated the Hamden Warehouse. (*Id.* ¶ 192.)

Similarly, a warehouse in Danbury, Connecticut ("Danbury Warehouse") "has acquired hundreds of thousands of dollars of smokeless tobacco and cigars from the Scranton Warehouse" since at least 2009, but vastly underreported the quantities acquired and vastly underpaid the required excise taxes to Connecticut. (*Id.* ¶ 203.) The Danbury Warehouse also charged prices below the break-even cost, such that "there is no way that excise tax can be properly collected when

selling" at those prices. (*Id.* ¶ 210.) Between September of 2009 and September of 2010, "there was telephonic contact between the Scranton Warehouse and the two telephone numbers for the Danbury Warehouse a total of 97 times." (*Id.* ¶ 212.)

Yet another warehouse, in Attleboro, Massachusetts ("Attleboro Warehouse"), also "acquired hundreds of thousands of dollars of smokeless tobacco and cigars from the Scranton Warehouse" since at least 2009, but failed to pay any of the required smokeless tobacco excise taxes and vastly underpaid the required cigar tobacco taxes to Massachusetts. (*Id.* ¶ 216.) During surveillance, agents "observed multiple tractor trailers (including from shipping company A. Duie Pyle) arrive at the [Attleboro Warehouse], and unload several pallets which were wrapped in black plastic." (*Id.* ¶ 220.) The affiant also observed, at the Scranton Warehouse, "tractor trailers (including those from commercial carrier A. Duie Pyle) being loaded from within the warehouse with pallets wrapped in black plastic." (*Id.*) Between 2009 and 2010, telephone and fax records for the Scranton Warehouse showed a total of 117 telephone calls to and from the Scranton Warehouse and the cell phone used by the operator of the Attleboro Warehouse, as well as 130 faxes between the two warehouses. (*Id.* ¶ 225.) Moreover, during a visit to the Attleboro Warehouse on April 17, 2012, the affiant observed smokeless tobacco boxes in a dumpster stamped with "Cigar and Supplies, Inc. Scranton PA 18505." (*Id.* ¶ 242.)

The Scranton Warehouse also distributed smokeless tobacco and cigars to seven gas stations in Connecticut which were "owned by three corporations in which [Defendant], or [Defendant's] wife, Tehmina Imran is a corporate officer." (*Id.* ¶ 243.) The gas stations would then "sell the tobacco products to the public without paying the required Connecticut tobacco taxes." (*Id.* ¶ 244.) The affiant received, via grand jury subpoenas, UPS records from January of 2009 to October of 2011 showing a number of shipments from the Scranton Warehouse to the gas stations. (*Id.* ¶ 259.) Moreover, on April 3, 2012 and May 8, 2012, an agent working with the affiant obtained search

warrants for "UPS packages that were en route to five of the Seven Gas Stations" from the Scranton Warehouse. (*Id.* ¶¶ 263-64.) All of the packages, which were subsequently re-packaged and delivered, contained smokeless tobacco and/or cigars. (*Id.*)

C. Connections between Defendant and Springfield Warehouse

Between July 8, 2010 and May 15, 2012, the affiant arranged for a confidential informant and an ATF undercover agent to purchase smokeless tobacco at the Springfield Warehouse using audio and video recording. (*Id.* ¶¶ 98-99.) During these encounters, smokeless tobacco boxes stamped with "Cigar and Supplies, Inc. Scranton PA" were observed. (*Id.* ¶¶ 101, 104, 108, 113, 119, 130.) In addition, the receipt obtained after the July 8, 2010 purchase was "exactly identical in layout and format as the receipts utilized by [Defendant] at the Scranton Warehouse." (*Id.* ¶ 103.) During the January 31, 2011 encounter, the confidential informant "engaged in brief conversation regarding the management of the Springfield Warehouse" with Ron Sliski, an employee, who "referred to the management of the Scranton Warehouse as being connected to the management of [the] Springfield Warehouse." (*Id.* ¶ 110.) The confidential informant then asked: "'so they're all in it together?'" (*Id.*) Sliski responded: "'it's like, you don't know nothing . . . it's like Mafia type of stuff . . . .'" (*Id.*) On another occasion, after Sliski had previously mentioned to the confidential informant that Jaspal Singh might be looking to sell the Springfield Warehouse business, Sliski told the confidential informant Singh could not sell the business because it was not really Singh's to sell but, rather, "people in Pennsylvania own" the Springfield Warehouse. (*Id.* ¶ 285.) Sliski also stated "that approximately once a week 'the guy' comes from Pennsylvania to pick up all the money at the Springfield Warehouse, and that he utilizes a large black bag to carry the cash out of the Springfield Warehouse." (*Id.*)

On August 31, 2011, the confidential informant and ATF undercover agent purchased smokeless tobacco at the Scranton Warehouse using audio and video recording. (*Id.* ¶ 278.) Both

spoke with Irfan Sami, the manager, who "confirmed that the Scranton Warehouse does not report sales data to other states." (*Id.* ¶ 282.) Sami explained that in Springfield, Massachusetts, "'we have a warehouse there, our own cash and carry spot.'" (*Id.* ¶ 283.) He also stated the Scranton Warehouse leases that "property to the operator of the Springfield Warehouse and has an investment stake in the business." (*Id.*) After the undercover agent asked Sami if the Springfield Warehouse was separate from the Scranton Warehouse, he responded that they were not separate. (*Id.*) He further explained that the Scranton Warehouse leases the Springfield Warehouse to Sami's third cousin, described as "'our business partner,'" and "'slowly he is paying off the business and then we have a small portion as an investment also.'" (*Id.*) The confidential informant told Sami they were looking to get a better price at the Scranton Warehouse than the Springfield Warehouse, to which Sami responded that he could not undercut the Springfield Warehouse because "'it's my own store.'" (*Id.*) Sami also stated he knew the confidential informant and undercover agent came down to Pennsylvania to try to save "'some tax dollars'" and that both warehouses use cash to avoid leaving a "'paper trail.'" (*Id.* ¶ 284.)

On March 6, 2012, the affiant interviewed an office manager of Harvest Properties, a company which handled the lease for the Springfield Warehouse. (*Id.* ¶ 132.) The office manager stated "the 'resident ledger' which Harvest utilizes to keep track of payments for their properties has always identified the renter [of the Springfield Warehouse] as 'SMB, Inc. S. Nawaz, S. Bokhari, J. Malick' as they were the original renters in 2000, and it is clear to Harvest that [Defendant] is still the responsible party for the rental of that space." (*Id.*) The office manager "stated that she never dealt with anyone other than [Defendant] for issues" regarding the Springfield Warehouse or a neighboring property which Defendant also rented. (*Id.*) In addition, the office manager related that Defendant had met with the owner of Harvest Properties, Mark Paley, in early January of 2012 to discuss new leases for those two properties. (*Id.* ¶ 133.) Thereafter, the office manager prepared the new leases and emailed them to Defendant at one of his Hotmail accounts, after which Defendant

called to request some changes. (*Id.* ¶ 134.) This involvement in the lease process led the office manager to believe that Defendant "is clearly the responsible party for all activities at those locations, and that he is and remains the only contact person that Harvest has" for the two properties. (*Id.* ¶ 135.) Moreover, the affiant obtained copies of all of the leases, checks, money orders, and resident ledgers for the Springfield Warehouse and the neighboring property from 2000 to that time. (*Id.* ¶ 136.) All of the leases list Defendant as "'personally responsible for the performance of this lease.'" (*Id.* ¶¶ 136-37, 139.) "[M]ost of the money orders or checks make reference to [Defendant] in the memo line or in some other manner," and "[s]everal of the return envelopes retained by Harvest Properties show a return address using the name of [Defendant] and/or his home address" in Middletown, Connecticut. (*Id.* ¶ 141.)

On March 26, 2012, the affiant interviewed Paley, the owner of Harvest Properties. (*Id.* ¶ 142.) "Paley stated that he has always—and only—dealt with [Defendant] regarding the rental of" the Springfield Warehouse and the neighboring property. (*Id.*) Paley also explained that whenever rent was behind for either property, he contacted Defendant and payment usually arrived a few days later. (*Id.* ¶ 143.) He further echoed the office manger's opinion that, despite the transfers of ownership of the properties, Defendant was considered by him to be "the responsible party and renter" of the Springfield Warehouse. (*Id.*) In addition, Paley stated that he did not know and had "never heard of Jaspal Singh or Harbhajan Singh," who were listed as the lessees on the 2008 and 2012 leases, respectively. (*Id.* ¶¶ 137, 139, 143.)

D. Sales Data and Cash Transactions

Defendant provided periodic reports regarding sales from the Scranton Warehouse to Management Science Associates ("MSA"), an information management company which "contracts with major tobacco manufacturers of smokeless tobacco . . . and cigars to collect and aggregate sales, distribution, and acquisition data from both the manufacturers themselves, and from the distributors

to whom they sell their product." (*Id.* ¶ 94.) According to an MSA representative, "manufacturers frequently encourage or mandate the distributors to whom they sell product to enroll in various Manufacturer Incentive Programs, wherein one of the manufacturer-imposed requirements is that the distributor sends their distributor-to-retail sales data to MSA." (*Id.*) Defendant used an EarthLink email account to register with MSA and tobacco suppliers' incentive programs. (Dkt. No. 242-1 ¶¶ 209-216.) MSA provided the affiant Defendant's "reported smokeless tobacco and cigar sales between September 2009 (when [Defendant] enrolled the Scranton Warehouse in the MSA program) and February 2012," and the affiant "conducted an analysis of sales from the Scranton Warehouse to various businesses for the time period of January 2010 to December 2011." (Dkt. No. 248 ¶ 96.) Based on this self-reported data, the affiant calculated the total amount of state tobacco taxes evaded or underpaid by the five warehouses from 2010 to 2011 as follows: Springfield Warehouse - $4,848,887.53; Berlin Warehouse - $2,541,664.07; Hamden Warehouse - $2,214,763.93; Danbury Warehouse - $1,399,035.50; and Attleboro Warehouse - $1,576,083.55. (*Id.* ¶¶ 153, 188, 198, 215, 233.)

According to the affiant, "it appears that the bulk of [the Scranton Warehouse's] business stems from the five warehouses in Massachusetts and Connecticut" identified above. (*Id.* ¶ 266.) For example, "[i]n a June 2011 real estate transaction involving the purchase of a hotel business in Wisconsin, [Defendant] stated that he was the 100% owner of [the Scranton Warehouse], and that it is 'one of the largest wholesale distributors of tobacco products (excluding cigarettes) and general merchandise in New England, Pennsylvania, New Jersey, and New York.'" (*Id.*) Defendant further stated that the Scranton Warehouse "'presently averages gross revenue of approximately $4,000,000 to $5,000,000 per month,'" and "'the company sells to only about a half dozen distribution companies which in turn sell to other smaller distributors and directly to convenience and other stores.'" (*Id.*) The affiant next explained that Defendant's "representation about the Scranton

Warehouse's business being focused on the handful of warehouses identified in this affidavit is consistent with the MSA data," which showed that "the Scranton Warehouse has only 17 customers, and 10 of those customers are Pennsylvania-based convenience stores with minimal sales and purchases." (*Id.* ¶ 267.) "The remaining seven customers are the Springfield, Attleboro, Berlin, Hamden, and Danbury Warehouses, plus two New Hampshire business which have not been the focus of [the affiant's] investigation." (*Id.*)

Agents working with the affiant reviewed and analyzed records from four bank accounts used by the Scranton Warehouse from 2007 to 2012, for which Defendant had signature authority and controlled the deposits and withdrawals. (*Id.* ¶ 268.) "From January 1, 2007 through February 29, 2012, a total of approximately $241,264,380.76 was deposited into these four accounts," and "[a]pproximately $191,051,127.08 of that total was deposited in cash." (*Id.* ¶ 269.) Moreover, "[o]f the cash deposits, a significant part was deposited at bank branches near the Scranton Warehouse or near [Defendant's] home in Connecticut." (*Id.*) Bank records also suggest Defendant used some of this cash to fund his personal bank account, consistent with a 2011 personal financial statement Defendant submitted to one of his banks stating that he received approximately $75,000 to $100,000 each month from the Scranton Warehouse "'as a profit distribution.'" (*Id.* ¶¶ 270-71.) However, there is no "record of exactly how much [Defendant took] in profits each month from the Scranton Warehouse." (*Id.* ¶ 271.) In addition, Defendant regularly moved "money among his various personal and business accounts," including accounts for the Hawthorne Inn and a Holiday Inn Express, both of which Defendant owned and controlled. (*Id.* ¶ 272.)

"On April 12, 2012, the Bureau of Alcohol, Tobacco, Firearms, and Explosives received a PACT Act registration form in the name of Cigar & Supplies Inc. at the address of the Scranton Warehouse," with Defendant listed as the "'Agent Authorized to Accept Service'" along with his home address in Middletown, Connecticut and one of the Hotmail email addresses. (*Id.* ¶ 276.) Prior

to this date, neither Cigar & Supplies, Inc. nor Defendant "had registered as a commercial seller, transferor, or shipper of smokeless tobacco with the United States government (ATF), Massachusetts, or Connecticut as required by" the PACT Act, nor had they "notified any state tobacco tax administrators of pertinent information regarding the recipients of his sales into other states as required by" the PACT Act. (*Id.* ¶ 275.)[2] Even after registering for these PACT Act disclosures, Defendant and Cigar & Supplies Inc. never provided Massachusetts or Connecticut officials with the monthly PACT Act filings. (*Id.* ¶ 277.)

In March of 2009, an employee of Defendant was robbed of approximately $65,000 of cash in New Jersey. (*Id.* ¶ 193.) Although the cash was recovered by law enforcement, it was then seized by Immigration and Customs Enforcement ("ICE") "under suspicion of being involved in bulk cash smuggling." (*Id.*) As a result, Defendant filed paperwork seeking the return of the money, including affidavits and documentary evidence "attesting to the fact that this money was legitimately earned as part of business . . . at the Scranton Warehouse." (*Id.* ¶ 194.) Defendant explained in an affidavit that the employee "'was transporting a cash deposit from the [Scranton Warehouse] to me at my home in Connecticut'" because Defendant was "'the only person authorized by the bank to make cash deposits exceeding $10,000'" and he had accidentally left a key to the bank drop box in Connecticut. (*Id.* ¶¶ 287-88.) Defendant also "provided 19 separate invoices, detailing sales between March 6 and 12th, 2009 from the Scranton Warehouse to a number of customers, including the Springfield,

[2] The PACT Act, passed by Congress in 2010 as an amendment to the Jenkins Act, requires "[a]ny person who sells, transfers, or ships for profit cigarettes or smokeless tobacco in interstate commerce" into a state "taxing the sale or use of cigarettes or smokeless tobacco" to register with the "Attorney General of the United States and with the tobacco tax administrators of the State . . . into which such shipment is made" and to file "a memorandum or a copy of the invoice covering each and every shipment of cigarettes or smokeless tobacco" with the "chief law enforcement officers of the local governments . . . that apply their own local . . . taxes on cigarettes or smokeless tobacco." 15 U.S.C. § 376(a).

In addition, the Contraband Cigarette Trafficking Act, makes it "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes or contraband smokeless tobacco." 18 U.S.C. § 2342(a). "[C]ontraband smokeless tobacco" is defined as "a quantity in excess of 500 single-unit consumer-sized cans or packages of smokeless tobacco, or their equivalent" on which state taxes have not been properly paid or required state records have not been properly kept. 18 U.S.C. § 2341(7).

Berlin, Danbury, and Hamden Warehouses." (*Id.* ¶ 289.) "Out-of-state customers like the Springfield, Berlin, Danbury, and Hamden Warehouses accounted for 99% of the total amount charged on the 19 invoices." (*Id.*) These invoices also showed that Defendant "engaged in 11 cash transaction in excess of $10,000 during March 6-12, 2012" without filing the required Form 8300 in violation 31 U.S.C. § 5331. (*Id.* ¶ 293.) According to the affiant, Defendant's "use of cash as the primary means of payment for product distributed from the Scranton Warehouse has many drawbacks for legitimate business," including safety and security concerns, but "it has many advantages for illegal businesses" due to the lack of a "paper trail." (*Id.* ¶¶ 290-92.)

E. Business Office in Berlin, Connecticut at Hawthorne Inn

In September of 2011, Defendant moved an office he used for many of his business ventures, including the three corporations which owned the gas stations discussed above, from Waterbury, Connecticut to the same address as the Hawthorne Inn in Berlin, Connecticut. (*Id.* ¶¶ 295-97.) This move was consistent with a statement made by Defendant, during an interview with Webster Bank officers at some point in 2011, that "he was intending to move his business operations to the Hawthorne Inn." (*Id.* ¶ 297.) The Hawthorne Inn is "a banquet hall which was purchased by [Defendant] during the course of [the affiant's investigation] with funds which are traceable to proceeds from the Scranton Warehouse." (*Id.*)

Georgia Christodolou—identified by the affiant, based on surveillance, as an employee at the Hawthorne Inn who lived in an apartment in Cromwell, Connecticut owned by Defendant—made a number cash deposits in excess of $100,000 into the Scranton Warehouse bank account at Webster Bank. (*Id.* ¶¶ 299-302.) She did so using "outsource bags," which allow a depositor to provide the bank with the cash to be counted at a later time. (*Id.* ¶ 302.) Webster Bank records identified Christodolou as the "'bookkeeper'" for the Scranton Warehouse. (*Id.* ¶ 303.) Webster Bank advised the affiant that Defendant ordered 1,300 outsource bags, with the most recent order shipped to

"'Cigar Supply c/o ITM Corp'" at the address for the Hawthorne Inn in Berlin, Connecticut. (*Id.* ¶ 304.)[3] Based upon this information—the pattern of deposits made by Christodolou, her identification as a "bookkeeper" for the Scranton Warehouse, her employment at the Hawthorne Inn, and the shipment of the outsource bags—the affiant believed Scranton Warehouse business operations and management of its finances were occurring at the Hawthorne Inn. (*Id.* ¶ 305.) Moreover, "this address provides [Defendant] a business office that is approximately 10 miles from his home in Middletown, CT," whereas "[t]he Scranton Warehouse is approximately 180 miles from [Defendant's] home, and Irfan Sami has stated to a Pennsylvania investigator that [Defendant] does not travel to the Scranton Warehouse every day." (*Id.*)

F. Defendant's Residence in Middletown, Connecticut

Defendant used his residential address in Middletown, Connecticut often "on business, real estate, or professional documents and affidavits, each of which in some way relates to his primary business operation of Cigar and Supplies, Inc., or the Scranton Warehouse." (*Id.* ¶ 315.) For example, for two of the parent companies of the gas stations discussed above, Defendant's home address is listed for "business records" in Connecticut tax administration records. (*Id.* ¶¶ 321-22.) Webster Bank account statements for the Scranton Warehouse were sent to his home address, as were statements from a TD Ameritrade investment account which were "funded in large part via deposits directly from the [Scranton Warehouse] Webster Bank account." (*Id.* ¶¶ 319, 323.) Defendant's affidavit following the robbery, discussed above, states the cash was being transported to Defendant's home at the time. (*Id.* ¶ 317.) In addition, mortgage payments for Defendant's home were paid directly out of the Scranton Warehouse business account at Webster Bank. (*Id.* ¶ 316.)

[3] "Cigar & Supplies, Inc.," as mentioned, is the corporate entity which operated out of the Scranton Warehouse, and "ITM Retail Corp." was identified by the affiant as one of the companies that owned or operated some of the gas stations discussed above and for which Defendant's wife was listed as an officer. (*Id.* ¶¶ 249, 253-54, 295.)

The affiant also explained, based on his experience as a criminal investigator, "that individuals, particularly those involved in partnerships and small businesses, maintain records and documents relating to those businesses in their residences" for a variety of reasons. (*Id.* ¶ 306.)[4] These reasons include easy access to business records, concealment of criminal activity, and the tendency of small business operators to blur the "delineation between home life and work life," among others. (*Id.* ¶ 306.) The affiant further explained that evidence of attempts to launder proceeds of criminal activity "is commonly secreted at [criminals'] residences." (*Id.* ¶ 307.) Moreover, "the tobacco industry is pervasively regulated at both the state and federal level, and . . . individuals engaged in the tobacco business know that they are subject to frequent, unannounced, and warrantless searches or demands for documents related to their tobacco business by state revenue agencies." (*Id.* ¶ 308.)[5] Thus, according to the affiant, "when criminals are subject to warrantless inspection, they often seek to secrete evidence, including documentary evidence, in locations over which they possess dominion and control, such as their homes." (*Id.*)

III. MOTION TO DISMISS THE SUPERSEDING INDICTMENT

Defendant asserts the superseding indictment is subject to dismissal because it appears, objectively, that he is the victim of a vindictive prosecution. Specifically, he argues the federal government's decision to prosecute him was retaliation for Defendant's successful challenge of his personal liability as to the 2009 Massachusetts Department of Revenue tax assessment. Defendant contends: (A) Tom Nowicki, the Massachusetts Department of Revenue investigator, prompted the

[4] The affiant further explained that "[e]ven though the amounts involved in this fraudulent scheme are large, [Defendant] and his co-conspirators are all small business men and women in the way they have structured their businesses and in the[] way they have operated them." (*Id.* ¶ 313.)

[5] In March of 2011, for example, the Pennsylvania Department of Revenue conducted an inspection of the Scranton Warehouse related to the sale of "little cigars." (*Id.* ¶ 93.) As a result, the Scranton Warehouse provided the state inspector with out-of-state customer lists, which showed both the Springfield and Berlin Warehouses. (*Id.* ¶¶ 93, 169.)

affiant's investigation; (B) Nowicki "[s]urely . . . was not pleased by [Defendant's] successful defense of the Massachusetts DOR assessment"; and, therefore, (C) "there is a reasonable likelihood that the government would not have brought the charges had [Defendant] simply paid the DOR's $40 million dollar assessment, instead of exercising his absolutely lawful right to challenge the assessment." (Dkt. No. 243 at 5-7.)[6] In response, the government argues Defendant has not demonstrated that any animus on the part of state investigators motivated the federal prosecutors to bring these charges. The court agrees with the government and, therefore, will deny Defendant's motion to dismiss.

"A prosecutor enjoys broad discretion in determining whom to prosecute for what crime, and such pretrial charging decisions are presumed to be legitimate." *United States v. George*, 839 F. Supp. 2d 430, 441 (D. Mass. 2012), *aff'd* 761 F.3d 42 (1st Cir. 2014). Nevertheless, "a prosecutor runs afoul of due process when he penalizes an individual for exercising a statutory or constitutional right." *Id.*; *see United States v. Jenkins*, 537 F.3d 1, 3 (1st Cir. 2008) ("A vindictive prosecution—one in which the prosecutor seeks to punish the defendant for exercising a protected statutory or constitutional right—violates a defendant's Fifth Amendment right to due process."). "To establish prosecutorial vindictiveness, a defendant must show that the prosecutor harbored genuine animus toward him and that he would not have been prosecuted but for that animus." *George*, 839 F. Supp. 2d at 441; *see United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982). "A defendant who lacks direct evidence of a vindictive motive can establish a rebuttable presumption of vindictiveness by demonstrating circumstances that reveal a sufficient likelihood of vindictiveness." *George*, 839 F. Supp. 2d at 441; *see Jenkins*, 537 F.3d at 3. "It is difficult to make such a showing pretrial, however, in light of the broad discretion afforded the prosecutor to determine who should be prosecuted and

[6] Defendant's challenge as to his personal liability for the 2009 assessment is discussed in more detail below, in section IV.B.2.

for what crime, and the presumption that the prosecutor has exercised that discretion in good faith." *United States v. Bucci*, 582 F.3d 108, 112 (1st Cir. 2009).

Here, even assuming Nowicki harbored animus against Defendant in the manner suggested, Defendant has set forth no link between that presumed animus and the prosecutors who actually made the decision to charge Defendant.

> [T]he animus of a referring agency is not, without more, imputed to federal prosecutors. A defendant must show that the ill will, whoever its bearer, actually motivated his prosecution. Thus, to connect the animus of a referring agency to a federal prosecutor, a defendant must establish that the agency in some way prevailed upon the prosecutor in making the decision to seek an indictment.

United States v. Monsoor, 77 F.3d 1031, 1035 (7th Cir. 1996); *see also Bucci*, 582 F.3d 108 at 114 ("[The defendant] must connect any vindictive animus to those making the challenged charging decisions in his case." (citing *United States v. Goulding*, 26 F.3d 656, 662 (7th Cir. 1994))). Defendant's counsel was straight forward at the hearing, indicating that he had no direct evidence of the prosecution being infected with animus but was entitled to a hearing, under these circumstances, to develop the issue. Moreover, as Nowicki is a *state* investigator, Defendant's attempt to impute his alleged animus to the *federal* prosecutors is even more attenuated, "[s]ince it is well settled that the conduct of two independent sovereigns does not lend itself to the concept of vindictive prosecution." *United States v. Stokes*, 124 F.3d 39, 45 (1st Cir. 1997) (internal quotation marks omitted).

Granted, Defendant also seeks an evidentiary hearing on this issue. But the First Circuit has explained that "a defendant seeking discovery [must] first . . . come forth with 'some' objective evidence tending to show the existence of prosecutorial vindictiveness," *Bucci*, 582 F.3d at 113, and, similarly, to obtain an evidentiary hearing, a defendant must "point to specific facts that raise a likelihood of vindictiveness," *United States v. Lanoue*, 137 F.3d 656, 665 (1st Cir. 1998). Defendant has made neither showing. Rather, Defendant merely speculates that Nowicki harbored animus against Defendant and, further, that this animus motivated the prosecutors' charging decision, and "such

speculation is plainly insufficient." *United States v. Spencer*, 873 F.3d 1, 16 (1st Cir. 2017); *see Bucci*, 582 F.3d at 114 (explaining that the defendant "must do more than simply identify a potential motive for prosecutorial animus" (internal quotation marks omitted)). Accordingly, because Defendant has not met his burden of establishing actual prosecutorial vindictiveness or a presumption of vindictiveness, nor he has made a sufficient showing to obtain discovery or an evidentiary hearing, his motion to dismiss the superseding indictment will be denied.

IV. MOTIONS TO SUPPRESS

Defendant also filed motions to suppress, in which he challenges the searches of the Scranton Warehouse, the Hawthorne Inn, his residence, and four email accounts.[7] Defendant argues the supporting affidavits fail to establish probable cause that he committed any crime or that evidence of any crime would be found at the Hawthorne Inn or his residence. He also argues a *Franks* hearing is necessary because of certain false and/or misleading assertions and omissions of material fact in the affidavits. In addition, Defendant argues the warrants were unconstitutionally overbroad and lacked particularity.

A. Probable Cause

"A warrant application must demonstrate probable cause to believe that (1) a crime has been committed—the 'commission' element, and (2) enumerated evidence of the offense will be found at the place searched—the so-called 'nexus' element." *United States v. Dixon*, 787 F.3d 55, 59 (1st Cir. 2015) (quoting *United States v. Feliz*, 182 F.3d 82, 86 (1st Cir. 1999)). "Probable cause does not demand certainty, or proof beyond a reasonable doubt, or even proof by a preponderance of the evidence—it demands only 'a fair probability that contraband or evidence of a crime will be found in

[7] While the warrants authorized the search and seizure of five separate email accounts, Defendant has included challenges as to four, one of which produced no records.

a particular place.'" *United States v. Rivera*, 825 F.3d 59, 63 (1st Cir. 2016) (quoting *Illinois v. Gates*, 462 U.S. 213, 235 (1983)). This court's "inquiry is a practical, common-sense one . . . that takes into account the totality of the circumstances," and which "afford[s] an ample amount of deference to the issuing magistrate's finding of probable cause." *United States v. Dixon*, 787 F.3d 55, 58-59 (1st Cir. 2015) (internal quotation marks and citations omitted). Moreover, even "[i]n a doubtful or marginal case, the court defers to the issuing magistrate's determination of probable cause." *United States v. Barnard*, 299 F.3d 90, 93 (1st Cir. 2002).

1. Commission Element

Defendant's main argument is that the search warrant affidavits do not establish probable cause to believe he committed any crime. He contends that because he did not ship, transport, or deliver any tobacco products to the five warehouses in Massachusetts and Connecticut, he had no obligation to collect taxes on those products or provide reports to state authorities.

The search warrant affidavits, however, were not necessarily required to demonstrate Defendant's criminal liability. Rather, they only had to demonstrate a "fair probability" that evidence of specified crimes,[8] including those committed by others, would be found at the places to be searched. As the Supreme Court has explained, "[t]he critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978). Thus, the Supreme Court in *Zurcher*, in a case involving a search of a student newspaper which was not implicated in any wrongdoing, rejected the proposition "that to secure a search warrant the owner or occupant of the place to be

[8] Here, the affidavits specified the following criminal violations for which evidence was sought: "violations of Title 15, Section 376 (Jenkins / PACT Act), Title 18, United States Code, Section 371, 2342(a), 1341, 1343, 1956, and 1957 (Conspiracy, Contraband Cigarette Trafficking Act, Mail Fraud, Wire Fraud, and Money Laundering), and Title 31, Sections 5324 and 532 (Financial Structuring)." (Dkt. No. 248 ¶ 3.)

inspected or searched must be suspected of criminal involvement." *Id.* at 556. Instead, the Court explained, "[o]nce it is established that probable cause exists to believe a federal crime has been committed a warrant may issue for the search of any property which the magistrate has probable cause to believe may be the place of concealment of evidence of the crime," and in *Zurcher* that happened to be the office of the student newspaper, where relevant photographs of a violent clash with the police were believed to be located. *Id.* at 558 (internal quotation marks omitted). The First Circuit subsequently expanded upon this holding: "the rule is obviously the same with respect to a person who the police do indeed suspect but do not have probable cause to arrest; such a person's property may be searched upon probable cause to believe that fruits, instrumentalities, or evidence of the crime are present, even though the products of the search may implicate him." *United States v. Melvin*, 596 F.2d 492, 496 (1st Cir. 1979).

In this case, the government demonstrated probable cause that the Springfield, Berlin, Hamden, Danbury, and Attleboro Warehouses ("Five Warehouses") unlawfully avoided or underpaid state tobacco taxes, and thereby also violated the PACT Act and the Contraband Cigarette Trafficking Act, and the Scranton Warehouse supplied the tobacco products to those warehouses. At the very least, therefore, records and other evidence possessed by Defendant and his business would help further uncover and quantify that alleged criminal conduct.

Although not required for probable cause, the affidavits adequately support the inference that Defendant bears criminal liability as well. For example, while the affidavits indicate the Five Warehouses often drove vehicles to the Scranton Warehouse and physically picked up the products there, they also suggest the Scranton Warehouse would ship the products across state lines. On March 29, 2006, the Scranton Warehouse offered to ship items through UPS during a call with a Massachusetts Department of Revenue compliance officer. Invoices from both the Hamden and Berlin Warehouses showed shipments via UPS and another commercial carrier. Moreover, as the

government argues, "[a]n entire section—ignored completely in the defendant's motion—of the affidavits described a scheme by which the Scranton Warehouse was shipping smokeless tobacco and other tobacco product, including cigars, to seven gas stations in Connecticut owned by corporations in which [Defendant] and/or his wife are corporate officers." (Dkt. No. 257 at 10-11.) Those gas stations were not licensed for tobacco distribution and failed to pay the required taxes. Thus, even under Defendant's interpretation of the law—in which no legal obligations arose so long as Defendant did not ship product across state lines—the affidavits provided an adequate basis to infer that he did ship untaxed tobacco products across state lines while failing to notify state tax authorities, in violation of federal law. In addition, as discussed below, the affidavits also provide probable to cause to believe Defendant had ongoing connections to the Springfield Warehouse, and likely was involved in its operation, even after relinquishing formal ownership.

2. Nexus Element

Defendant additionally contends the nexus element has not been satisfied as to the Hawthorne Inn and his residence. "The nexus between the objects to be seized and the premises searched need not, and often will not, rest on direct observation, but rather 'can be inferred from the type of crime, the nature of the items sought, the extent of an opportunity for concealment and normal inferences as to where a criminal would hide [evidence of a crime].'" *Feliz*, 182 F.3d at 88 (quoting *United States v. Charest*, 602 F.2d 1015, 1017 (1st Cir. 1979)). The affidavits here provided sufficient information to satisfy the nexus requirement as to both of the challenged locations.

As to the Hawthorne Inn, for example, Christodolou was identified by Webster Bank as the "bookkeeper" for the Scranton Warehouse, she worked out of the Hawthorne Inn, she was surveilled making large cash deposits into the Scranton Warehouse bank account at a branch near the Hawthorne Inn, and "outsource bags" for these deposits were sent to the Hawthorne Inn. Therefore, it was reasonable to infer that records of these transaction were kept at the Hawthorne

Inn. Moreover, the corporations which owned the Connecticut gas stations used the Hawthorne Inn as a business office. As the government argues, all of this information "shows the intermingling of the various strands of [Defendant's] businesses" and creates a fair probability that evidence of the tax fraud scheme would be found at the Hawthorne Inn. (Dkt. No. 257 at 26.)

As to the residence, the affidavit Defendant submitted in connection with the 2009 robbery shows that cash from the Scranton Warehouse was being transported to his home at the time to be thereafter deposited into the Webster Bank account. These and other related bank and financial records were sent to Defendant's residence. Defendant also used his residential address in connection with various businesses, including two of the three corporations which owned the Connecticut gas stations. Again, this shows the intermingling of his business and personal affairs and supports the inference that records pertinent to the tax fraud investigation would be found at Defendant's residence. Moreover, in light of the 2011 inspection of the Scranton Warehouse by the Pennsylvania Department of Revenue, there was an adequate basis to infer that Defendant would keep Scranton Warehouse business records at his home, consistent with the affiant's assertion that "the tobacco industry is pervasively regulated . . . and that individuals engaged in the tobacco business know that they are subject to frequent, unannounced, and warrantless searches or demands for documents." (Dkt. No. 248 ¶ 308.)[9]

B. *Franks* Inquiry

"A defendant is entitled to a *Franks* hearing . . . only if he first makes a substantial preliminary showing . . . that a false statement or omission in the affidavit was made knowingly and intentionally or with reckless disregard for the truth and that the false statement or omission was

[9] Even if the affidavits had provided an insufficient connection to the Hawthorne Inn and Defendant's residence, or failed to satisfy the commission element, the good faith exception would prevent suppression, as it was reasonable for the law enforcement officers to rely on the issuance of the warrants, which three separate magistrate judges approved. *See United States v. Leon*, 468 U.S. 897, 922 (1984).

necessary to the finding of probable cause." *United States v. Arias*, 848 F.3d 504, 511 (1st Cir. 2017) (internal quotation marks omitted). As clarified at the hearing and in a post-hearing brief, Defendant principally relies on four categories of alleged misrepresentations or omissions in support of his *Franks* hearing request: (1) Defendant did not maintain an ownership or operational interest in the Springfield Warehouse after 2006; (2) Defendant did not ignore the $40,000,000 assessment issued by the Massachusetts Department of Revenue; (3) the Five Warehouses did not constitute the "bulk" of Defendant's business from the Scranton Warehouse; and (4) Defendant did not minimize the paper trial in conducting his business. The court concludes Defendant has not met his burden to obtain a *Franks* hearing.

1. Ownership of Springfield Warehouse

In support of his assertion that the affidavits falsely asserted Defendant continued to maintain an ownership or operational interest in the Springfield Warehouse after 2006, Defendant cites a number of exhibits showing transactions among various business entities and individuals in connection with the Springfield Warehouse. (Def's Exs. 6, 7, 15-27.) As an initial matter, the search warrant affidavits do not state that Defendant maintained a formal ownership interest in the Springfield Warehouse after that time. The affidavits do suggest, however, that Defendant had continuing connections to the Springfield Warehouse and likely was involved in the Springfield Warehouse's operations. This inference is amply supported by the facts recounted in the affidavits, and nothing in the exhibits cited by Defendant undermines it.

For example, the affiant interviewed an office manager and the owner of Harvest Properties in March of 2012, revealing that Defendant continued to negotiate the lease for the Springfield Warehouse in 2012, he was personally responsible for all the leases of the Springfield Warehouse since at least 2000, and he was the only person Harvest Properties had ever dealt with regarding the property. In addition, conversations between the confidential informant and employees of both the

Springfield and Scranton Warehouses indicated management of the two warehouses were connected and Defendant may have been a de facto owner or operator of the Springfield Warehouse. Defendant asserts the affiant failed to "establish the reliability or basis of knowledge" for these comments, (Dkt. No. 245 at 20), but the vast majority of these conversations were recorded with an undercover ATF agent present as well. Moreover, some of the exhibits submitted by Defendant also support the inference of a continuing connection between Defendant and the Springfield Warehouse, including the fact that the Articles of Organization for Discount Novelties & Merchandise, Inc. (the entity that operated the Springfield Warehouse from 2008 to 2010) list Defendant's wife as a corporate officer. (Def's Ex. 20.) The affidavits and other documents adequately support the inference that Defendant continued to be involved in the operation of the Springfield Warehouse and was not "strictly an arms-length supplier of products to the Springfield Warehouse," as Defendant argues. (Dkt. No. 245 at 12)

2. $40,000,000 Assessment

Defendant next asserts the affiant "created the false impression that [Defendant] knowingly and willfully ignored a $40 million dollar assessment by the Massachusetts Department of Revenue . . . when in fact the Department of Revenue concluded that [Defendant] was *not* responsible for the assessment." (Dkt. No. 245 at 15.) He cites an April 18, 2011 letter from his attorney to the Massachusetts Department of Revenue disputing Defendant's personal liability for the tax assessment and an April 29, 2011 letter from the Department of Revenue in response agreeing that Defendant was not personally liable. (Def's Exs. 8, 9.)[10]

On this point, the search warrant affidavit states in relevant part that on July 2, 2009, the Massachusetts Department of Revenue issued a "Notice of Assessment" against "SMB, Inc. c/o

[10] The letter from Defendant's attorney explains "[t]here was no so-called 'responsible officer' liability in Massachusetts with respect to cigarette excise liabilities until a change in the law" effective July 1, 2010. (Def's Ex. 8.)

[Defendant]" covering the years 2001 to 2008 for failure to pay Massachusetts excise tax on smokeless tobacco, totaling $40,636,273.80 (including interest and penalties). (Dkt. No. 248 ¶ 67.) It next states:

> According to Inv. Nowicki, neither SMB, Inc. nor [Defendant] have paid any of the monies due to the state of Massachusetts, and, as far as Inv. Nowicki knows, neither is engaged in any current legal or financial discussions with the state to pay any owed excise taxes in whole or in part. Further, Inv. Nowicki advised me that due to laws and regulations concerning businesses and taxes, he believes that the Commonwealth of Massachusetts does not have the legal ability to pursue any collection efforts against [Defendant] himself, as the entity charged was actually "SMB, Inc.," which is not and was not ever a legal corporation in the state of Massachusetts.

(*Id.* ¶ 68.)

The court agrees with Defendant that it was misleading to omit from the affidavit the information regarding Defendant's successful defense of his personal liability for this assessment. As written, the affidavit suggests Defendant entirely ignored the tax assessment and states it was Nowicki who "believe[d]" Massachusetts could not collect against Defendant personally. In reality, however, the Department of Revenue communicated to Defendant its conclusion that he was not personally responsible for the assessment. Nevertheless, even assuming this omission was made intentionally or with reckless disregard for the truth, the court agrees with the government's larger point that inclusion of the omitted information would not have negated probable cause. As discussed above, the affidavit is replete with information demonstrating massive tobacco tax fraud was occurring at the Five Warehouses from 2010 to 2011; evidence of this fraud was likely to be found at the Scranton Warehouse, the Hawthorne Inn, and Defendant's residence; and Defendant likely was aware of and involved in the scheme to some extent. The two letters cited by Defendant regarding the $40 million tax assessment, while somewhat misleading to omit, do nothing to alter this fundamental information. In fact, as the government argues, to have added these details regarding Defendant's successful avoidance of personal liability for the $40 million assessment may

actually have bolstered probable cause by "help[ing] to explain the corporate shell game that took place in the years 2005 to 2012." (Dkt. No. 257 at 14.)

3. "Bulk" of Sales to Five Warehouses

Defendant also challenges the following assertion in the affidavits: "it appears that the bulk of [the Scranton Warehouse's] business stems from the five warehouses in Massachusetts and Connecticut." (Dkt. No. 248 ¶ 266.) He argues this statement is false and the Five Warehouses actually comprised less than 35% of the Scranton Warehouse's total sales. In addition, Defendant argues the MSA data cited by the affiant in support only related to three manufacturers, relying on four exhibits admitted at the hearing. (Def's Exs. 11-14.)

As an initial matter, arriving at the 35% figure Defendant references is without factual support. Moreover, while Defendant contends the exhibits show the Scranton Warehouse only submitted data to MSA for three manufacturers, the exhibits actually state that MSA would only be *distributing* the submitted sales data to three manufacturers; they do not establish that Defendant limited his submissions in the first instance to those three manufacturers. More fundamentally, as the government points out, the affiant was "careful not to overstate anything," as he prefaced the "bulk of" statement with the cautionary language "it appears." (Dkt. No. 274 at 5.) The affiant also referenced Defendant's statement, in a 2011 real estate transaction, that the Scranton Warehouse "'sells to only about a half dozen distribution companies,'" which was "consistent with the MSA data." (Dkt. No. 248 ¶ 267.) Defendant has not challenged that real estate transaction statement. Lastly, even assuming Defendant is correct that the Five Warehouses did not constitute the majority of the Scranton Warehouse's business—but, rather, only comprised some smaller figure, like 35%—that in no way negates probable cause. Again, Defendant has not disputed that the Five Warehouses were engaged in tax fraud and that the Scranton Warehouse supplied those warehouses with tobacco products. Accordingly, as explained, there was probable cause to believe records pertinent to the tax

fraud would likely be found at the Scranton Warehouse, the Hawthorne Inn, and Defendant's residence.

4. Minimization of Paper Trail

Defendant additionally challenges the affiant's statement that "the Scranton Warehouse operates in a way that minimizes the 'paper trail' that could be tracked by state tobacco tax authorities, primarily by conducting business almost exclusively in cash." (Dkt. No. 248 ¶ 265.) Defendant contends, in contrast, that his "business practices were memorialized, open and transparent." (Dkt. No. 245 at 21.) In support, he cites a number of statements in the affidavits describing instances in which Defendant and/or the Scranton Warehouse provided information to third parties or a government agency. Moreover, Defendant asserts, without any factual support, that he "deposited every single dollar of cash he received from the warehouses into the banking system," the Scranton Warehouse "made every purchase of product via the banking system," and the Scranton Warehouse "paid every single dollar of tax money due and payable, as did [Defendant] in terms of his personal income." (*Id.* at 22.)

As the government argues, merely because Defendant disclosed certain information at various times—itself recounted in the affidavits—"does not change the fact that doing business in cash disguises the sources of payment in a way that checks would disclose." (Dkt. No. 257 at 18.) The affidavits, moreover, adequately support the assertion regarding the Scranton Warehouse "conducting business almost exclusively in cash," which had the effect of minimizing the paper trail. As for Defendant's contentions regarding depositing all the cash in the banking system, making every purchase through the banking system, and paying all taxes, the court again agrees with the Government that these assertions are not only unsupported but unverifiable. Thus, "[t]he affiant cannot be condemned for failing to include statements that cannot be substantiated." (*Id.*)

5. Other Alleged Misrepresentations or Omissions

Defendant had also asserted additional categories of alleged misrepresentations or omissions in his motion to suppress, namely: (A) he was "not involved with SMB, Inc." from 2001 to 2005; (B) the affidavits omitted Defendant's $400,000 "Offer of Compromise" as to the $2,286,375.62 assessed against SMB, Inc. in Connecticut, which the Connecticut Department of Revenue Services accepted; and (C) the affidavit omitted information regarding the two checks totaling $90,000 with "50%" written in the memo line. To the extent not abandoned by Defendant, the court rejects these arguments as well.[11]

With regard to Defendant's involvement with SMB, Inc., the exhibit he cites, a letter written by his attorney to dispute an assessment of sales tax, does not support his argument. (Def's Ex. 10.) The letter merely states that another individual "was the primary operator of SMB, Inc." during that time period; it does not say Defendant was "not involved" with that business whatsoever and does not undermine the information in the affidavits demonstrating Defendant's involvement, including his role in managing the lease on behalf of the company. As to the "Offer of Compromise," Defendant has provided no support for this assertion. In any event, similar to the $40 million assessment discussed above, this alleged omission does not undermine probable cause in light of all the other information contained in the affidavits. Lastly, contrary to Defendant's argument, the affidavits do not state that the "50%" written in the memo line was in Defendant's handwriting or that this demonstrated he had a 50% interest in the Springfield Warehouse. Moreover, Defendant's assertion that the checks were a loan to "Jaspal Singh and Mr. Singh's second partner . . . so they could buy out their third partner, resulting in a 50% interest in the company by Mr. Singh" is not factually supported. (Dkt. No. 245 at 21.) In any event, including this additional information would not have negated probable cause.

[11] Defendant also argued he did not ship, transfer, or distribute "contraband" smokeless tobacco, but the court already rejected this assertion in Section IV.A.1.

C. Particularity

Lastly, Defendant asserts the search warrants failed to comply with the Fourth Amendment's particularity requirement. According to Defendant, the attachments describing the specific items to be searched and seized were overbroad in both the general, introductory language and in the list of subcategories. Moreover, Defendant argues, the warrants' authorization of the seizure of computers, cell phones, and emails was overbroad as well.

The Fourth Amendment provides: "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. "The particularity requirement demands that a valid warrant: (1) must supply enough information to guide and control the search and what to seize, and (2) cannot be too broad in the sense that it includes items that should not be seized." *United States v. Kuc*, 737 F.3d 129, 133 (1st Cir. 2013).

Here, the warrants for the Scranton Warehouse, the Hawthorne Inn, and Defendant's residence authorized the seizure of:

> All records, in whatever form (including electronic), and tangible objects that constitute evidence, fruits, or instrumentalities of violations of Title 15, Section 376 (Jenkins Act / PACT Act), Title 18, United States Code, Sections 371, 2342(a), 1341, 1343, 1956, and 1957 (Conspiracy to Commit Mail/Wire Fraud, Contraband Cigarette Trafficking Act, Mail Fraud, Wire Fraud, Conspiracy to Commit Money Laundering, and Money Laundering), and Title 31, Section 5324 and 5321 (Financial Structuring), including . . . [eighteen specific subcategories].

(Dkt. No. 245-3, 245-4, 245-5.) The subcategories generally related to documents associated with "other tobacco products" ("OTP"), which included "cigars, little cigars, smokeless tobacco, snuff, chewing tobacco, and loose tobacco." For example, subcategory 5 lists "[r]ecords relating to the purchase and sale of OTP, including but not limited to: invoices, packaging slips, commercial bills of

lading, shipping manifest, shipping labels, product catalogs, order forms, inventory reports, billing records, and any financial record detailing the amount, price paid, and terms of sale of OTP." (*Id.*) The warrant for the Earthlink email accounts authorized the following seizure:

> For the time period February 27, 2002 to the present, all information described above in Section I that constitutes fruits, evidence and instrumentalities of violations of 15 U.S.C. 375 et. seq. (PACT/Jenkins Act); 18 U.S.C. § 1341 (Mail Fraud), 18 U.S.C. 1343 (Wire Fraud); 18 U.S.C. § 2341 et. seq. (Contraband Cigarette Trafficking Act), including for each email address identified on Attachment A, information pertaining to the following matters: . . . . Communications related to: a. The operation of Cigar & Supplies, Inc., ITM Retail, Discount Novelties and Merchandise, and/or any other tobacco related businesses; b. Suppliers, customers, or others related to the acquisition, disposition, control, or management of tobacco products; c. Individuals involved in business dealings pertaining to tobacco products with [Defendant], including but not limited to Jaspal Singh; d. Any of [Defendant] or Imran's businesses, corporations, holdings, or properties known to the affiant to be currently or previously involved in the purchase or sale of tobacco products, and/or . . . to be funded with proceeds from tobacco-related businesses; and e. The receipts, proceeds, banking records, financial management, and profits of [Defendant] and Imran's tobacco businesses or other businesses funded by tobacco-derived profits.

(Dkt. No. 242-1.) The warrant for the Hotmail email accounts included essentially the same language as the Earthlink warrant but expanded the time period to begin on January 1, 2000. (Dkt. No. 242-2.)

Contrary to Defendant's argument, neither the broad first clause nor the listed subcategories were unparticularized, because each must be read in context with the other. "A warrant's language must be read in context, such that 'the general tail of the search warrant will be construed so as not to defeat the particularity of the main body of the warrant.'" *Id.* at 133 (quoting *United States v. Abrams*, 615 F.2d 541, 547 (1st Cir. 1980)). As in *Kuc*, the warrants here "include[] a transitional phrase that connects a broad first clause, which identifies the criminal offenses that the target evidence was expected to establish, with a detailed and particularized second clause." *Id.* Because the first clause cannot be read in isolation, but must instead be read together with the detailed list in the second clause, it does not fail the particularity requirement. *See id.* The inverse is also true. The detailed subcategories must be read together with the criminal offenses listed in the first clause such

that the warrants "authorize[] the seizure of documents within the . . . categories *if* they are evidence of the listed crimes." *United States v. Tsarnaev*, 53 F. Supp. 3d 450, 457 (D. Mass. 2014); *see also United States v. Manafort*, 313 F. Supp. 3d 213, 232 (D.D.C. 2018) ("Thus, the warrant did not authorize the seizure of 'any and all financial records' in the storage unit, but 'any and all financial record' related to [the criminal offenses listed in the introductory clause]."). Properly read, therefore, the warrants provided sufficient guidance to the executing officers and were not too broad in including items that should not have been seized.

Defendant also complains the warrants were too broad in authorizing the seizure of computers, cell phones, and emails. However, the warrants' two-step process—authorizing the seizure of these items for a later, off-site search consistent with the limitations just described—does not violate the Fourth Amendment. *Upsham*, 168 F.3d 532, 535 (1st Cir. 1999); *see also United States v. Kanodia*, 2016 WL 3166370, at *6-7 (D. Mass. June 6, 2016). Moreover, this procedure is specifically authorized by Rule 41 of the Federal Rules of Criminal Procedure. *See* Fed. R. Crim. P. 41(e)(2)(B) ("A warrant . . . may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant."); *see also* Fed. R. Crim P. 41, advisory committee's note (2009) ("Computers and other electronic storage media commonly contain such large amounts of information that it is often impractical for law enforcement to review all of the information during execution of the warrant at the search location. This rule acknowledges the need for a two-step process: officers may seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant.").

Even if the warrants here were too broad in some respect, the remedy would not be blanket suppression of all the evidence, "but partial suppression." *United States v. Falon*, 595 F.2d 1143, 1149 (1st Cir. 1992). Defendant has not argued for partial suppression, however, or identified specific

evidence he contends should be suppressed; he merely seeks blanket suppression. Most importantly, even if the warrants did violate the particularity requirement, the good faith exception would apply to prevent suppression of the evidence in any event. *See Kuc*, 737 F.3d at 134; *Tsarnaev*, 53 F. Supp. 3d at 457-58. As was true in both *Kuc* and *Tsarnaev*, it was objectively reasonable for the executing officers to rely on the validity of the warrants in light of the magistrate judges' authorization.

V. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss (Dkt. No. 243) and motions to suppress (Dkt. Nos. 242 and 245) are DENIED.

/s/ Mark G. Mastroianni
MARK G. MASTROIANNI
United States District Judge